Supreme Court, U.S.
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No. 90-1848 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BLUE CROSS AND BLUE SHIELD
OF MARYLAND, INC.,

Petitioner,

v.

ROBERT WEINER, SR., MARGARET WEINER, MARK WEINER,
AND ROBERT WEINER, SR. AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF STEVEN WEINER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Daily Record Co., Baltimore, MD 21202

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 90-1008

ROBERT WEINER; MARGARET WEINER; MARK WEINER; ROBERT WEINER, as personal representative of the estate of Steven Weiner,

Plaintiffs—Appellees

versus

BLUE CROSS & BLUE SHIELD OF MARYLAND, INC.,

Defendant—Appellant

and

BLUE CROSS OF MARYLAND, INC.; BLUE SHIELD OF MARYLAND, INC.; BLUE CROSS/BLUE SHIELD OF FLORIDA, INC.,

Defendants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Paul V. Niemeyer, District Judge. (CA-89-2256-PN)

Argued: November 1, 1990 Decided: January 31, 1991

Before HALL and MURNAGHAN, Circuit Judges, and CACHERIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Murnaghan wrote the opinion, in which Judge Hall and Judge Cacheris joined.

ARGUED: Shale David Stiller, FRANK, BERNSTEIN, CONAWAY & GOLDMAN, Baltimore, Maryland, for Appellant. Larry S. Stewart, STEWART, TILGHMAN, FOX & BIANCHI, P.A., Miami, Florida, for Appellees. ON BRIEF: Leonard E. Cohen, Allan P. Hillman, William L. Reynolds, FRANK, BERNSTEIN, CONAWAY & GOLDMAN, Baltimore, Maryland; H. Russell Smouse, WHITEFORD, TAYLOR & PRESTON, Baltimore, Maryland, for Appellant. James B. Tilghman, Jr., STEWART, TILGHMAN, FOX & BIANCHI, P.A., Miami, Florida, for Appellees.

MURNAGHAN, Circuit Judge:

Robert Weiner, Sr., a gasoline station owner and operator in Broward County, Florida, wanted to obtain group health insurance for himself and family members. Through a Florida association of gasoline retailers, he obtained the coverage for his family which he desired. What he received was a group policy showing a national group, the Service Station Dealers of America, as an employer and designating those covered by the policy as "employees." The policy never was, however, subscribed to by the Service Station Dealers of America, being signed instead by an insurance agency marketing group plans for Blue Cross.

The policy obtained by Robert Weiner, Sr. covered himself and his wife and two dependent children, Steven and Mark. Another son, Robert Weiner, Jr., was an employee of his father's gas station and was over the age of majority. Consequently, he obtained an individual policy.

Then, in 1982, tragedy struck. Steven was diagnosed as suffering from, and died less than two years later with, AIDS. Mark was rendered a quadriplegic as the result of an automobile accident.

Benefits were paid under the policy for medical care until August 1983, when such benefits were discontinued on the grounds that Steven and Mark were no longer covered. Robert Weiner, Sr. promptly filed suit to compel continuation of benefits. Approximately seven months later, Blue Cross of Maryland, Inc. resumed payments under the policy and reimbursed Weiner for past payments which had been omitted. Blue Cross has, since March of 1984, complied with all contractual obligations under the policy.

However, claiming substantial hardship, Weiner and his wife sued Blue Cross of Maryland (as well as Blue Cross/Blue Shield of Florida, a servicing agent) in a Florida state court. Fraud, negligence, and intentional infliction of emotional distress were asserted. The case proceeded to trial on the merits, and judgment was entered for $5,000 in compensatory damages and $5,000,000 in punitive damages against Blue Cross of Maryland. Compensatory damages of $200,000 and punitive damages of $1.5 million were assessed against Blue Cross/Blue Shield of Florida. The trial judge further awarded $1.4 million in attorney's fees. Judgment, entered in September 1986, was under Florida law to bear interest at 12% per annum.

An appeal was taken to the Florida Fourth District Court of Appeal where the Florida Blue Cross, for the first time, made the contention which is the focus of the case we are called upon to resolve. It asserted that the health care plan in question involved an employer and an employee and consequently was covered by the Employee Retirement Income Security Act, 29 U.S.C. §§1001 *et seq.* (ERISA). It was thus argued that, since ERISA confers exclusive and preemptive jurisdiction on the federal courts, the trial court should have been impotent to enter the judgment. The request was made to vacate the judgment or, alternatively, to remand to the trial court for a further hearing on the preemption issue.

We need not linger over the question of whether, if the plan were indeed covered by ERISA, the case should not

have been heard by a state court. We may at least *arguendo* assume that such would be true. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). However, before we even reach that question, which depends on ERISA's governing the plan, we first must determine *whether* the Florida state courts found that the plan did or did not constitute an ERISA plan. The Florida intermediate appellate court determined that the plan was not governed by ERISA on the basis that no employee plan had been shown to exist. *Blue Cross/Blue Shield of Florida, Inc. v. Weiner*, 543 So.2d 794 (Fla. Dist. Ct. App. 1989). Thereafter the Florida Supreme Court denied Blue Cross' request for review, 553 So.2d 1164 (1989), and the United States Supreme Court denied *certiorari*, _____ U.S. _____, 110 S. Ct. 1475 (1990).

Blue Cross/Blue Shield did not give up easily. When Weiner filed the Florida judgment in the Circuit Court for Baltimore County under the Uniform Enforcement of Judgments Act, Md. Code Ann., Courts and Jud. Proc. Art., §§11-801 *et seq.*, Blue Cross removed the case to the United States District Court for the District of Maryland, filing a motion to vacate or, in the alternative, to hold an evidentiary hearing on whether the plan was covered by ERISA. Judge Paul V. Niemeyer, then of the United States District Court for the District of Maryland, refused to take a step which would interfere with the *res judicata* status of the Florida case. *Weiner v. Blue Cross of Maryland*, 730 F. Supp. 674 (D. Md. 1990).

The question before us is a relatively simple one blown to somewhat grandiose proportions because of the huge amount of money involved. It is well established that "a former judgment in a state court is conclusive between the parties and their privies in a federal court when entered upon an actually contested issue as to the jurisdiction of the court over the subject matter of the litigation." *Stoll v. Gottlieb*, 305 U.S. 165, 173 (1938). To escape the effect of the *Stoll* decision, Blue Cross seeks to invoke the principle of *Kalb v. Feuerstein*, 308 U.S. 433 (1940). However, *Kalb* represents a

narrowly defined limitation (not here present) on the holding in the *Stoll* case. Such a situation arises only in circumstances indicating that the question of which jurisdiction, state or federal, should control *was intended to be resolved solely by a federal court.* To similar effect, Blue Cross cites the *Restatement (Second) of Judgments*, §12 and 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, §3536 (2d ed. 1984). But, because resolution of the question before us may be by state or federal court, cases of the kind presented in *Kalb* (a case raising the question of whether federal bankruptcy law or state law should govern the case) are flatly distinguishable from cases facing the jurisdictional issue of ERISA *vel non. See, e.g., Browning Corp. Int'l v. Lee*, 624 F. Supp. 555, 557 (N.D. Tex. 1986); *cf. International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 393 (1986); *Blue Cross and Blue Shield of Maryland, Inc. v. Weiner*, 868 F.2d 1550, 1555 (11th Cir.), *cert. denied*, _____ U.S. _____, 110 S. Ct. 239 (1989)(affirming a Florida federal district court decision to abstain with respect to the same question with which we are presented).

Here, determining that on the merits there were no grounds sufficient to justify disregard of the result where jurisdiction existed, we do not interfere.

The commentators are assiduously careful to make the very same distinction. *See* 13A Wright, Miller & Cooper, *Federal Practice and Procedure*, §3536 n.12 at 539 (1984), and Karen Nelson Moore, *Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments*, 66 Cornell L. Rev. 534, 542, 560-61 (1981).

We conclude therefore, that the decision giving *res judicata* effect to the Florida judgment should be

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT WEINER, et al.	*	
v.	*	CIVIL NO. PN-89-2256
BLUE CROSS OF MARYLAND, INC., et al.	*	
	*	

Filed: February 5, 1990.

Larry S. Stewart, Esq., and James B. Tilghman, Jr., Esq., Miami, Florida; Clarence M. Thomas, Esq., Timonium, Maryland; William A. Hahn, Jr., Esq., Durkee, Thomas, and Hahn, Baltimore, Maryland; for plaintiffs.

Shale D. Stiller, Esq., Leonard E. Cohen, Esq., Allan P. Hillman, Esq., Peter H. Gunst, Esq., Frank, Bernstein, Conaway & Goldman, Baltimore, Maryland; H. Russell Smouse, Esq., Whiteford, Taylor & Preston, Baltimore, Maryland; for defendants Blue Cross of Maryland, Inc., Blue Shield of Maryland, Inc., and Blue Cross and Blue Shield of Maryland, Inc.

Niemeyer, United States District Judge.

OPINION AND ORDER

Plaintiffs Robert Weiner and his family obtained a judgment in the amount of $6.9 million against Blue Cross and Blue Shield of Maryland and related companies (Blue Cross) in the state courts of Florida. The judgment arose out of Blue

Cross' failure to pay timely under a health care policy. The judgment, which was entered in September 1986, has been accruing interest at the rate of 12% per annum and now approximates $9.3 million. When the Weiners filed the judgment in the Circuit Court for Baltimore County, Maryland, as part of the first steps toward enforcing it against Blue Cross, Blue Cross removed the action to this Court and filed a motion to vacate the judgment in a collateral attack, contending that the Florida state court had no authority to enter a judgment. It contends that the action was preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.* The Weiners moved to remand the action to state court on the ground that a proceeding to enforce a judgment is not an action that is removable under 28 U.S.C. § 1441. Having considered the well-prepared memoranda of the parties and the arguments presented at the hearing on January 12, 1990, the Court will deny both the motion to remand and the motion to vacate.

I. BACKGROUND

In early 1982 Robert Weiner, Sr., the owner and operator of a gas station in Broward County, Florida, contacted the state association of gasoline retailers known as Allied Gasoline Retailers' Association of Florida (AGRA), which is affiliated with a national group known as Service Station Dealers of America (SSDA), to obtain group health insurance. After joining AGRA, Robert Weiner, Sr. obtained a family policy which covered his wife and two dependent children, Steven and Mark. His third son, Robert Weiner, Jr., who was an employee of the gas station and over the age of majority, obtained an individual policy. The group policy showed SSDA, the national organization, as employer and designated the members as "employees." That policy was never subscribed to by SSDA, but was signed by an insurance agency that marketed group plans for Blue Cross. Members qualified for coverage under the plan so long as they

remained employees or until the age of 19 if they were dependents of employees.

In 1982 two sons of Robert Weiner, Sr. suffered tragedies. Steven was diagnosed with AIDS, and he died less than two years later. Mark was rendered a quadriplegic as a result of an automobile accident.

Blue Cross provided payments for medical care under Robert Weiner, Sr.'s policy until August 1983 when it concluded that Steven and Mark were no longer covered. Robert Weiner filed suit one month later to compel continuation of payments and approximately seven months later Blue Cross resumed payments under the policy and reimbursed Robert Weiner for past payments. The parties agree that since March 1984 Blue Cross has paid all contractual obligations under the policy.

The failure of Blue Cross to provide coverage apparently caused the Weiners substantial hardship, and they sued Blue Cross as well as Blue Cross/Blue Shield of Florida, a servicing agent, for state common law claims of fraud, negligence, and intentional infliction of emotional distress. The jury returned verdicts in favor of all plaintiffs and against all defendants on all counts. The plaintiffs were awarded $500,000 in compensatory damages and $5,000,000 in punitive damages against Blue Cross and $200,000 in compensatory and $1.5 million in punitive damages against Blue Cross/Blue Shield of Florida. The trial judge awarded $1.4 million in attorneys' fees which were calculated at three times the lodestar amount. Judgment was entered in September 1986, and under Florida law it bears 12% per annum interest until paid.

The judgment was appealed to the Florida Fourth District Court of Appeal, an intermediary appellate court, where Blue Cross and Blue Cross/Blue Shield of Florida raised for the first time the defense that the health care policy was part of a plan as defined by ERISA and that therefore the

actions were preempted by federal law. They contended that the trial court had no power to enter judgment and that the judgment should be vacated. Alternatively, they requested that the case be remanded to the trial court for a further hearing on the preemption issue. The Florida appellate court rejected the arguments based on the record that had been developed, affirmed the judgment against Blue Cross, but reversed the judgment against Blue Cross/Blue Shield of Florida. *Blue Cross/Blue Shield of Florida, Inc. v. Weiner*, 543 So.2d 794 (Fla. Dist. Ct. App. 1989). The Florida Supreme Court denied a petition for review, and a petition for a writ of certiorari is now pending in the Supreme Court of the United States.

Before the Florida appellate court rendered its decision, Blue Cross filed a suit in the United States District Court for the Southern District of Florida seeking an injunction on preemption grounds. The District Court denied the injunction, relying on the doctrine of abstention. *Blue Cross and Blue Shield of Maryland, Inc. v. Weiner*, No. 88-6290-Ryskamp (S.D. Fla. May 17, 1988). On appeal the Eleventh Circuit affirmed, 868 F.2d 1550, and the Supreme Court denied a petition for writ of certiorari. _____ U.S. 110 S. Ct. 239 (1989).

The Weiners began enforcement of their judgment by filing it in the Circuit Court for Baltimore County, Maryland, under the Uniform Enforcement of Foreign Judgments Act, Md. Code Ann., Courts and Jud. Proc. Art., § 11-801 *et seq.* Blue Cross removed the action to this Court under 28 U.S.C. § 1441 and filed a motion to vacate the Florida judgment. Alternatively, Blue Cross seeks to have an evidentiary hearing on the issue whether the health care plan issued by Blue Cross was a plan regulated by ERISA, 29 U.S.C. § 1003(a).

After the Florida trial court entered judgment and before the Florida appellate court rendered its decision, the Supreme Court of the United States decided *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987) and *Metropolitan Life*

Insurance Co. v. Taylor, 481 U.S. 58 (1987). These cases articulated the scope and strength of the preemption of ERISA. Because Blue Cross did not have the benefit of those decisions before the trial, it contends that it has not had the opportunity to try to a fact-finder the issue whether the health care policy issued to the Weiners was regulated by ERISA.

II. REMOVAL

The Weiners have moved to remand this action to the Circuit Court for Baltimore County. They contend that their proceeding in the Circuit Court for Baltimore County to enforce a Florida judgment is not a "civil action" that is removable under 28 U.S.C. § 1441, but rather is an ancillary proceeding to the Florida action, and the time for removing the Florida action has long since passed. *See, e.g.*, 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3721 (2d ed. 1985) at 202 & n. 54 (collecting cases). They also urge that the decisions in *Barrow v. Hunton*, 99 U.S. 80 (1878), and *Eisenhardt v. Coastal Indus., Inc.*, 324 F. Supp. 550 (M.D. Pa. 1971), which hold that a motion to vacate a judgment is ancillary to the judgment and therefore not removable, should be dispositive of the question whether proceedings to enforce a judgment are removable.

Under the common law, the procedure to enforce the judgment of one jurisdiction in another required the filing of a new suit in the second jurisdiction to enforce the judgment of the first. The suit on the judgment was an independent action, *see, e.g., Indemnity Ins. Co. of N. Am. v. Smoot*, 152 F.2d 667, 670 (D.C. Cir. 1945), *cert. denied*, 328 U.S. 835-36 (1946), and thus was removable under 29 U.S.C. § 1441. The Weiners point out, however, that rather than pursuing a common law action, they simply filed a copy of the Florida judgment in the Circuit Court for Baltimore County pursuant to the Uniform Enforcement of Foreign Judgments Act, Md. Code Ann., Courts and Jud. Proc. Art., § 11-801 *et seq.*

They argue that the filing of the Florida judgment was not an independent action because the "filed foreign judgment has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, staying, enforcing, or satisfying as a judgment of the court in which it is filed." *Id.*, §11-802(b). Thus, they argue that the Florida judgment filed in the Circuit Court for Baltimore County under the Uniform Enforcement Act is the same as if the judgment against Blue Cross had been originally entered in Baltimore County. Its enforcement, they contend, is an ancillary proceeding and not an independent action that is removable.

Blue Cross contends that the Uniform Enforcement Act does not alter the traditional tests of removability of actions. The judgment was entered in Florida, and the Weiners could only enforce it in Maryland by suing on the judgment in Maryland. The Uniform Enforcement Act, it contends, merely streamlined the process for suing on the judgment.

When originally written, the Uniform Enforcement of Foreign Judgments Act was not intended to alter the rights of debtors vis-à-vis their judgment creditors. As stated in the Commissioner's Prefatory Note to the Uniform Enforcement of Foreign Judgments Act of 1948, "By this act procedure is made available under which the judgment creditor can effectively obtain relief and at the same time *adequate protection is given the judgment debtor to present any defense that can now be interposed to an action on such judgment.*" 9A U.L.A. at 474 (1965) (emphasis supplied). It would thus appear that the Act was designed as a facilitating device. *See, e.g., Jones v. Roach*, 118 Ariz. 146, 575 P.2d 345 (1977) (Uniform Act does not create substantive rights not conferred by the Full Faith and Credit Clause of the United States Constitution but is merely a uniform procedural act by which those rights and defenses afforded under the clause may be enforced or imposed).

When the Uniform Enforcement Act was revised in 1964, the procedure was modified to parallel that established by 28 U.S.C. § 1963, which allows a prevailing party to enforce a federal district court judgment by registering it in another federal district. *See* Commissioner's Prefatory Note 9A U.L.A. at 486-87 (1965). Registration pursuant to 28 U.S.C. § 1963 is considered "the equivalent of a new judgment of the registration court." *See Stanford v. Utley,* 341 F.2d 265, 268 (8th Cir. 1965).

The Uniform Enforcement Act was enacted in Maryland, effective July 1, 1987. Md. Code Ann., Courts and Jud. Proc. Art., §§ 11-801 through 11-807. It provides that a judgment creditor may file with the clerk of a circuit court in Maryland an authenticated copy of the judgment of another state. § 11-802(a). When so filed, the foreign judgment will have the same effect as does a judgment of the circuit court in which it is filed. § 11-802(b). The Act provides for notice to the debtor, § 11-803, and a filing fee, § 11-805. Finally, the judgment creditor is given the alternative procedure of bringing an action to enforce the foreign judgment. § 11-805.

While the Uniform Enforcement Act eliminates the need for filing of a complaint and following other procedures, it does not purport to alter any substantive rights or defenses that otherwise would be available either to the judgment creditor or the judgment debtor if suit were filed to enforce that foreign judgment. Since the judgment debtor would be entitled to remove to federal court an independent action to enforce a judgment that satisfied the provisions of 28 U.S.C. § 1441, the adoption by a state of an act merely to streamline the procedure should not alter the right of removal which was created by Congress. To conclude otherwise allows for the impermissible possibility that state procedural enactments alter federal policy on a state-by-state basis. *See, e.g., Grubbs v. General Electric Credit Corp.,* 405 U.S. 699, 705 (1972) (removal statute should have "uniform nationwide application"). *See also Colonial Bank & Trust Co.*

v. Cahill, 424 F. Supp. 1200, 1203 (N.D. Ill. 1976) (creation of new remedy in lieu of judicial proceeding does not preclude removal jurisdiction).

Moreover, to conclude that the removability of an enforcement action is dependent upon whether a complaint or a copy of the judgment is filed celebrates form over substance and confers the option of removability on the plaintiff when Congress intended that option to be exercised by the defendant. *See* 28 U.S.C. § 1441.

The Court concludes that when the holder of a judgment seeks its enforcement in another state, the initiation of that proceeding, by whatever form established by the state, is a civil action as used in 28 U.S.C. § 1441.

The cases of *Barrow v. Hunton*, 99 U.S. 80 (1878), and *Eisenhardt v. Coastal Indus., Inc.*, 324 F. Supp. 550 (M.D. Pa. 1971), which are relied on by plaintiffs, do not suggest a different conclusion. Both *Barrow* and *Eisenhardt* involved unsuccessful efforts by debtors to vacate judgments. In *Barrow*, the debtor filed a motion to nullify a judgment in the same court which had issued the judgment. In *Eisenhardt*, the debtor removed the case to federal court and then moved to vacate. No independent actions to enforce the judgments were brought against the debtors; instead, the debtors' motions in the two cases were "merely tantamount to the common law practice of moving to set aside a judgment for irregularity." *Barrow*, 99 U.S. at 83. Thus, the Supreme Court in *Barrow* and the district court in *Eisenhardt* found that the cases should be remanded. In contrast, the judgment creditors in this case are attempting to enforce a Florida judgment in Maryland, a procedure that requires the initiation of an independent action. The Uniform Enforcement Act has not altered this. Accordingly, the motion of plaintiffs to remand will be denied.

III. THE COLLATERAL ATTACK

Blue Cross contends that the judgment entered against it by the Florida court on state common law causes of action must be vacated on collateral attack because they were preempted by ERISA and the state court therefore had no power to enter judgment. 29 U.S.C. §§ 1144(a) and 1132(e) (1). They rely on the principles set forth in *Kalb v. Feuerstein*, 308 U.S. 433 (1940) and Restatement (Second) of Judgments § 12 (1982).

It is now well established that in enacting ERISA, Congress preempted state common law causes of action asserting claims under or related to employee welfare benefit plans that are regulated by 29 U.S.C. § 1003(a). *See*, 29 U.S.C. § 1144(a); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). Not only are state common law claims preempted by ERISA, but Congress also established the federal courts as the exclusive forum for adjudicating many aspects of ERISA. 29 U.S.C. § 1132(e) (1). Other aspects are authorized by Congress to be resolved by state courts. *See* 29 U.S.C. §§ 1132(e) (1) and 1132(a) (1) (B). Because the claims asserted by the Weiners in this case do not include a claim to recover benefits due to them under the plan (issues which are triable in state courts), the parties agree that if the plan involved here was one regulated by ERISA, ERISA would preempt all state causes of action and only a federal court could adjudicate the claims.

ERISA preemption is not merely a defense which may be waived. Rather, it is jurisdictional and deprives the state court of the power to adjudicate. The preemptive force is of such power that the state law is displaced, state jurisdiction is extinguished, and any judgment entered is void *ab initio*. *Pilot Life Ins. Co v. Dedeaux*, 481 U.S. at 54-56; *cf. International Longshoremen's Association v. Davis*, 476 U.S. 380, 388-93 (1986) (NLRA preemption). Accordingly, if a state

court attempts to default an ERISA claim on a procedural basis, such as the fact that preemption was not raised as an affirmative defense, any judgment entered will nevertheless be a nullity. Similarly, as an exception to the rule that an affirmative defense based on a federal ground ordinarily will not support removal of state causes of action to federal court, the force of preemption under ERISA will support removal. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. at 63-67.

It is these principles, which are not disputed by the parties, on which Blue Cross relies to urge that the judgment entered against it by the Florida court on state common law causes of action must be vacated on collateral attack. These contentions, however, are grounded on the assumption that the plan involved in this case was regulated by ERISA as defined by 29 U.S.C. § 1003(a).

The plaintiffs contend that the group policy issued by Blue Cross to Robert Weiner, Sr. was not a plan as regulated by ERISA and that the principles of preemption do not apply. They contend that a full record was developed during trial in the Florida trial court which shows that Robert Weiner, Sr. bought a group policy for his family through a marketing device developed by Blue Cross and that there was no plan adopted by an employer or group of employers for employees. The Weiners contend that the record supports the following factual conclusions:

> While the insurance Mr. Weiner purchased from [Blue Cross] purported to be part of a plan established by the Service Station Dealers of America ("SSDA"), an association of employers, it turned out this was just a fraudulent marketing scheme. The group policy was really established and maintained by [Blue Cross] and Associated Financial Services, Inc. ("AFSI"), an insurance broker, to target a perceived market niche. SSDA was never consulted about the plan, it never gave Blue Cross permission to use its name, and its signature was actually forged on

> the insurance contracts that made up the plan. The decision to limit coverage to service station dealers and their employees was an "underwriting decision" made by [Blue Cross] and AFSI. It was not an ERISA driven decision made by an employer or association of employers.
>
> Twelve days after the insurance contracts were forged, an endorsement was issued to the policies eliminating SSDA and its affiliates as both the contracting party and as the insured group. AFSI, the insurance broker, was substituted in SSDA's place. Thereafter, contrary to [Blue Cross'] position, the testimony and documentary evidence introduced at trial showed that no further agreements or endorsements, with the Allied Gasoline Retailers Association of Florida ("AGRA") or any other entity, were made or obtained.
>
> The group insurance policy was then marketed as an SSDA plan, but it was nothing more than an arrangement between two entrepreneurial businesses to sell insurance. It was never established or maintained by an employer or association of employers, and in keeping with its true nature no attempt was ever made to comply with ERISA's reporting requirements.

Memorandum in Support of Plaintiffs' Motion to Strike at 6-7 (footnote omitted). The plaintiffs urge that under the criteria described in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982), the health insurance issued to the Weiners is not part of an employee benefit welfare plan and ERISA does not apply.

With equal confidence, Blue Cross asseverates that the plan is an employee welfare benefit plan under ERISA. It notes that Robert Weiner, Jr. (who is not only the son but the employee of Robert Weiner, Sr. and who would not qualify as a dependent under a family policy) had an individual policy issued under the plan to him. Blue Cross notes that the plan only allowed employees to be members, and upon termination of an employee, the insurance terminated. Blue Cross argues that SSDA and its Florida affiliate, AGRA, are bona

fide employer organizations. It contends that the record supports the following contentions:

> In summary, the undisputed facts show that under ERISA, the Department of Labor ERISA Regulations, the Department of Labor News Release, and judicial decisions, both the AGRA plan and the Weiner Station plan were ERISA benefit plans as a matter of law: the AGRA plan at the association level, and the station plan at the individual employer level. Further, two experienced executives of firms in the business of administering association group plans have unequivocally stated in their affidavits that the AGRA plan was an ERISA benefit plan.
>
> * * *
>
> The group insurance was not available to service stations in Florida until AGRA joined the overall plan; Robert Weiner, Sr. was told that Weiner Service Station would have to join AGRA before insurance would be available to the Station's employees; and the station joined AGRA in order to obtain group insurance. . . .In fact, when asking about and applying for the insurance, Mr. Weiner dealt exclusively with a field representative of AGRA and not with a representative of AFSI.

Reply Memorandum in Support of Defendants' Motion to Vacate at 40-41, 42.

Although the facts relating to the underwriting and subscription of the plan were developed at the trial court level, the issue whether the plan was an ERISA plan was never presented to the trial court for resolution by Blue Cross. It was raised and briefed on appeal. The Florida appellate court ruled that the plan was not an ERISA plan. It stated:

> Maryland's [Blue Cross'] principle assertion on appeal is that there is a lack of jurisdiction over the subject matter because the plaintiffs' claim is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001-1461, ("ERISA"), and that state courts do not have concurrent jurisdiction. *See also Pilot Life Insurance Co. v.*

> *Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549, 95 L.Ed.2d 39 (1987). However, we find that ERISA does not apply to this policy.
>
> ERISA regulates employee benefit plans, including ones providing for medical and hospital care, if the plan is established or maintained by an employer or employee organization or both. ERISA § 4(a), 29 U.S.C. § 1003(a). Here, the record does not support a conclusion that there was an employee plan. The record does not reveal any agreement between the service station dealers association and Maryland [Blue Cross] or AFSI. The evidence, although disputed, reflects that the plaintiff here was sole proprietor who simply purchased a group policy for his family. See *Xaros v. U.S. Fidelity & Guaranty Co.*, 820 F.2d 1176 (11th Cir. 1987); *Donovan v. Dillingham*, 688 F.2d 1387 (11th Cir. 1982); *Taggart Corp. v. Life and Health Benefits Administration, Inc.*, 617 F.2d 1208 (5th Cir. 1980). Here there was no plan, or even an informal agreement, established or maintained by an employer or an employee organization. Nor were any fiduciary responsibilities created by this insurance marketing scheme, which simply made group insurance available to members of the organization.

Blue Cross/Blue Shield of Florida. Inc. v. Weiner, 543 So.2d 794, 798 (Fla. Dist. Ct. App.) (review denied by the Fla. Supreme Court, pet. for cert. pending in the U.S. Supreme Court).

In view of the foregoing, the plaintiffs contend that the Florida courts had the power to resolve the facts and thereby determine their own jurisdiction; that the decision of the state court that the plan was not an ERISA plan is a final judgment entitled to preclusive effect under the principles of res judicata; and that judgment on the issue of subject matter jurisdiction is not subject to collateral attack.

Although Blue Cross recognizes that in ordinary circumstances the judgment of a state court should be given res judicata effect by a federal court, *see* 28 U.S.C. § 1738, it argues that this judgment falls within that narrow range of

matters where principles of federal policy supersede the principles of res judicata. It relies on Restatement (Second) of Judgments § 12 and *Kalb v. Feuerstein*, 308 U.S. 433 (1940), and the statements made by Professors Wright and Miller. See 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3536 at 539-40 (2d ed. 1984), which reads:

> [W]hen a federal statute has vested exclusive jurisdiction of a particular type of case in the federal courts, the finding by a state court that it has jurisdiction over such a case will not preclude collateral attack upon the judgment rendered in the state court.

See also 18A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4428 at 283-85 (1981) (violations of exclusive federal jurisdiction may leave a state judgment vulnerable to collateral attack). It argues that Professor Moore's treatise also supports their position when he says that "if taken as absolute, [res judicata] might occasionally result in a serious interference with constitutional or statutory allocations of power. As a consequence, it has been held-. . .that competing considerations dictate that collateral attack on jurisdictional grounds be permitted." 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* 0.405[4.—1] at 214-15 (2d ed. 1989).

The issues presented raise sensitive questions of federalism that require balancing on the one hand principles underlying the Supremacy Clause and on the other hand the proper recognition of power reserved to the states under the Tenth Amendment.

There can be little doubt that state courts retain a competency to determine issues of federal law and that, as Congress has from time to time resolved, they actually participate in the resolution of issues of federal law. Likewise federal courts resolve issues of state law. The federal and state courts together function as a system, coordinated by sophisticated principles of federalism. As observed by Alexander

Hamilton in *The Federalist*, No. 82, at 491, 493 (C. Rossiter ed. 1961):

> 'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE.
>
> * * *
>
> When . . .we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union where it was not expressly prohibited.

Except in a small class of cases where Congress has specified that state courts should not even entertain a federal jurisdictional question, neither federal courts nor state courts control in advance where litigation is filed and they both carry out the important responsibility of channeling cases to the appropriate fora by applying principles of federal-state jurisdiction. It is necessary therefore that a court have the power to define its own jurisdiction and that decisions on those issues be given effect under principles of res judicata in all but a narrow class of cases. *See e.g. Kalb v. Feuerstein*, 308 U.S. 433 (1940). Restatement (Second) of Judgments § 12 (1982). As the Supreme Court noted in *Allen v. McCurry*, 449 U.S. 90, 95-96 (1980), "res judicata and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system."

Blue Cross argues, however, that there are circumstances, as described in the Restatement § 12, when a court should not give res judicata effect to the prior judgment of state

courts. The Restatement states that a court's subject matter jurisdiction can be relitigated if:

> (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
>
> (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government. . . .

Blue Cross urges that those exceptions are applicable here.

When Congress has provided for the automatic ouster of state court jurisdiction such that the question of preemption requires no jurisdictional finding to give it effect, and a state nevertheless proceeds to judgment in conflict with the Congressional intent, it is apparent that collateral attack is available against that judgment. For example, when a debtor files a bankruptcy proceeding, the state is deprived automatically of its jurisdiction and any further action by the state is not only a nullity but is subject to collateral attack. *Kalb v. Feuerstein*, 308 U.S. 433 (1940). Similarly, when a case is removed under 28 U.S.C. § 1441 from a state court to a federal court, the state court is automatically deprived of jurisdiction to hear the matter unless and until the federal court remands it. If the state court proceeds to judgment after removal, the judgment is a nullity and is subject to collateral attack. *United States v. Ohio*, 487 F.2d 936 (Temp. Emer. Ct. App. 1973), *cert. denied*, 421 U.S. 1014 (1975).

In each of these cases the Congress determined that the state courts were preempted from even determining whether federal jurisdiction applied, and the continued exercise by the state court of jurisdiction was so plainly beyond its jurisdiction that it was a manifest abuse of the state's authority to continue. Likewise the exercise in those circumstances by a state court of jurisdiction infringed on the authority of the federal courts on matters preempted not only as to subject matter but as to the appropriate forum for decision.

On the other hand when under one set of facts jurisdiction is preempted by federal law and under another it is not, or when under a given set of facts jurisdiction depends on a legal interpretation, a state court has the power, and when confronted with the issue, the duty, to apply federal law and determine the issue of preemption. As the Supreme Court noted in *International Longshoremen's Ass'n, AFL-CIO v. Davis:*

> A claim of *Garmon* preemption [established by *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)] is a claim that the state court has no power to adjudicate the subject matter of the case and when a claim of *Garmon* preemption is raised, it must be considered and resolved *by the state court.*

476 U.S. at 393 (emphasis supplied, dealing with preemption under the NLRA). The determination by the state court on the issue whether it or the federal court has subject matter jurisdiction will be given res judicata effect on that issue. This holding does not constitute a subversion of the Supremacy Clause but rather is a recognition that judicial power is shared in a dual system of courts under the principles of federalism that were structured by the Constitution. The Supremacy Clause is preserved by judicial review in the Supreme Court and by various other intermediary methods of review established by Congress, such as by removal, 28 U.S.C. § 1441; independent action to recover for civil right's violations, 28 U.S.C. § 1343; and habeas corpus, 28 U.S.C. § 2254. But the care and sensitivity adopted by the federal courts to preserve the rightful balance is preserved in several statutory and judicially adopted doctrines, such as the anti-injunction statute, 28 U.S.C. § 2283; the doctrine of abstention; the *Rooker-Feldman* doctrine (prohibiting appellate review in a federal district court of a state judgment, which is discussed below); and the recognition given to state judgments, 28 U.S.C. 1738.

The power of a state court to participate in the delineation of federal-state jurisdictional issues by applying the doctrine of res judicata to its decisions was affirmed in *Durfee v. Duke*, 375 U.S. 106 (1963). In *Durfee* a Nebraska resident brought suit against a Missouri resident in a Nebraska court to quiet title to land situated on the Missouri River, which forms the border between the two states. The Nebraska court had subject matter jurisdiction over the dispute only if the land was in fact part of Nebraska. Whether the land was in Nebraska depended entirely on resolving a factual question—whether a shift in the Missouri River had been caused by avulsion or accretion. *Id.* at 108. The Missouri resident appeared in the Nebraska court and litigated the question. The Nebraska court found that the land was in Nebraska and thereupon quieted title in the Nebraska resident. The case was appealed to the Nebraska Supreme Court, which affirmed the trial court. The Missouri resident did not petition the United States Supreme Court to review the Nebraska Supreme Court.

Two months later, the Missouri resident filed suit in Missouri to quiet title to the same land. The suit was promptly removed to federal district court by reason of diversity of citizenship. The district court stated that it thought the land was in Missouri but felt bound by the factual determination made by the Nebraska court. The court of appeals reversed, holding that the normal principles of res judicata were not applicable because land was involved; therefore, the Nebraska judgment was not entitled to full faith and credit. On petition for a writ of certiorari, the United States Supreme Court reversed, affirming the judgment of the district court.

The Supreme Court held that when asked to give effect to a foreign court's jurisdiction, a court may constitutionally inquire into that foreign court's jurisdiction to render judgment. *Id.* at 111. The general rule to be applied is that "a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry dis-

closes that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." *Id.* The Court added that "the general rule is no different when the claim is made that the original forum did not have jurisdiction over the subject matter." *Id.* at 112 (citations omitted).

The Court justified its reasoning by quoting from *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938):

> "We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. . . .Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first." 305 U.S. at 172.

Durfee, 375 U.S. at 113-14. The Court did note the general rule of finality has exceptions, citing to *Kalb v. Feuerstein*, 308 U.S. 433 (1940) (preemption), and *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940) (sovereign immunity). *Durfee*, 375 U.S. at 114. The Court also noted, however, "that in neither of these cases had jurisdictional issues actually been litigated in the first forum." *Id.* at 114. n. 12.

The *Durfee* case is particularly apropos to the case at hand. The state court in Florida determined its own jurisdiction, just as the Nebraska court did in *Durfee*. In both cases, the issue arose as to whether the judgment should be treated as final in a federal court in another state at a later time. The Missouri resident in *Durfee* argued that the Nebraska

court was without jurisdiction, seemingly assuming that it was self evident that the land in dispute was not in Nebraska. The Supreme Court held that "the location of land . . .is a 'matter to be resolved by judicial determination'" and once that issue has been fully litigated and judicially determined, it cannot be relitigated. *Durfee,* 375 U.S. at 115 (citation omitted).

The instant case is similar in that Blue Cross argues that the Florida court was without jurisdiction, again assuming that it is abundantly clear that the Weiners' health plans were covered by ERISA. The applicability of ERISA, however, is a matter that state courts can and indeed must resolve. *See, e.g., Browning Corp. Int'l v. Lee,* 624 F. Supp. 555, 557 (N.D. Tex. 1986) (state courts must have ability to determine if ERISA governs particular employee benefit plan to effectively enforce state insurance laws). Blue Cross had "the opportunity to assert, and did assert, the preemption issue in its state court appeal." *Blue Cross and Blue Shield of Maryland, Inc. v. Weiner,* 868 F.2d 1550, 1555 (11th Cir.), *cert. denied,* _____ U.S. _____, 110 S. Ct. 239 (1989). Therefore, since the ERISA preemption issue has been litigated, relitigation of the issue is barred for the same reasons announced in *Durfee.*

Error by the state court may be avoided by federal review in at least two ways. The case can be removed in the first instance to federal court under 28 U.S.C. § 1441, or the decisions of the state court can be reviewed by the appellate courts of the state and ultimately by the Supreme Court of the United States. This is not a case calling for the additional method of collateral attack that is permitted in the narrow class of cases defined by *Kalb v. Feuerstein, supra,* and *United States v. Ohio, supra,* when the ouster of jurisdiction is automatic. On the contrary, as described above, this case is one in which the state court was empowered to determine its own jurisdiction. Once having done so, the court's decision should be recognized by giving it res judicata effect.

Moreover, a collateral attack on the judgment in the circumstances of this case runs afoul of the *Rooker-Feldman* doctrine developed over time in two Supreme Court cases bearing those names. In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), a bill in equity was brought in the federal district court in Indiana to have a judgment of the state court, which had been affirmed on appeal by the Indiana Supreme Court, declared a nullity. The Supreme Court of the United States held that the federal district court did not have jurisdiction to set aside the state judgment because of alleged errors committed by the state courts on constitutional questions. The Supreme Court stated that

> [i]f the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding.

Id. at 415. The Court's holding was based on the Supreme Court's exclusive jurisdiction to review the decisions of the state supreme courts and the fact that the federal district courts possessed only original jurisdiction. *Id.* at 416.

The Supreme Court reaffirmed *Rooker* in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Feldman sought review in a federal district court of a decision by the District of Columbia Court of Appeals that denied him entry to the Bar. The Supreme Court of the United States held that the federal district court did not have jurisdiction to review allegations that were "inextricably intertwined" with the District of Columbia Court of Appeals' decision. *Id.* at 486-87. Together, *Rooker* and *Feldman* stand for the principle that lower federal courts may not decide federal issues that are raised in state proceedings and are "inextricably intertwined" with the state court's judgment.

Blue Cross argues that *Rooker* and *Feldman* are inapplicable to this case because the litigation here is an independent action in a foreign state and thus this Court is not sitting as an appellate court over the Florida courts. While this case is an independent action, the independent status of this litigation does not deter from the applicability of the principle enunciated in *Rooker* and *Feldman*. Were this Court to vacate the Florida court's judgment, as requested by Blue Cross, it would, in effect, be sitting as an appellate court reviewing the Florida court's jurisdictional determination. This is just what the Eleventh Circuit seems to have already resolved against Blue Cross. *See Blue Cross and Blue Shield of Maryland, Inc. v. Weiner*, 868 F.2d at 1554-55 (11th Cir.).

To violate the principles of federal-state jurisdiction as discussed in this Opinion would discredit the judicial authority of state courts and open the way to an additional and routine level of review by way of collateral attack in any case where state courts reject preemption, no matter how carefully litigated or disposed of. To allow this new method of review in this type of case would be inconsistent with the principles of federalism carefully developed over the years.

At oral argument Blue Cross argued that even if its preemption issue had been raised and fully tried at the trial court level, the principle of res judicata should be subjugated to the principle of federal preemption. In its papers, however, it argued that it never had the opportunity to raise and try the preemption issue. It contends that the Supreme Court decisions in *Pilot Life Ins. Co., supra*, and *Metropolitan Life Ins. Co., supra*, were not decided until after the state court judgment. It did raise the issue on appeal, citing those cases and urging remand to the trial court to develop the record more fully.

It would appear that the Eleventh Circuit in *Blue Cross and Blue Shield of Maryland, Inc. v. Weiner*, 868 F.2d 1550 (1989), has already concluded that Blue Cross had a reasonable opportunity to litigate the jurisdictional issue. After

observing that the *Rooker-Feldman* doctrine only applies if the federal plaintiff has had a reasonable opportunity to raise the federal claim in the state court proceedings, the court concluded that Blue Cross "had the opportunity to assert, and did assert, the preemption issue in its state court appeal. Because the Florida appellate court is an appropriate forum for determining whether the state trial court had jurisdiction, the *Rooker-Feldman* bar applies to BCBS-Maryland's preemption claim." *Id.* at 1555. If the Florida appellate court's judgment was erroneous, the remedy was to appeal to a higher court.

More importantly to a sense of justice, however, is the observation that the defendants were not denied the right to raise preemption at the trial court level by an absence of knowledge that the defense was available. Many cases had already decided at that time that preemption was a proper defense. *See e.g., Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1469-70 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987); *Powell v. Chesapeake & Potomac Tel. Co. of Va.*, 780 F.2d 419, 421-22 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1356-57 (9th Cir. 1984); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1215-16 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981). Were there any doubt, the very language of ERISA could not be more clear. It provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a). The term "state law," as used in that section is specifically defined to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c) (I). The statute also makes clear that, except for claims for benefits under an

employee welfare benefit plan, "the district courts of the United States shall have *exclusive* jurisdiction of civil actions. . ." 29 U.S.C. § 1132(e) (1) (emphasis supplied). When Blue Cross did not even raise the defense of preemption in the face of these explicit statutory provisions, one is prompted to inquire whether Blue Cross believed, at the time that it was defending the action at the trial level, that its group plan was in fact an ERISA plan.

Because the Court concludes that it should not sit in review of the Florida state court judgment pursuant to a collateral attack, it will not conduct an evidentiary hearing on the issue whether Robert Weiner, Sr.'s insurance policy was regulated by ERISA. Rather, the Florida judgment resolving this issue will be given effect under principles of res judicata and the motion to vacate will be denied.

For the reasons given in this Opinion, it is hereby Ordered this *5th* day of February, 1990, that:

1. The motion of the plaintiffs to remand this case to the Circuit Court for Baltimore County, Maryland, is denied.

2. The motion of the defendants to vacate and stay enforcement of the judgment of the Florida courts is denied. The stay entered by the Court in the order of October 5, 1989, is lifted.

3. Defendants' request for an evidentiary hearing is denied.

4. The Clerk of the Court is directed to mail a copy of this Opinion and Order to counsel of record and to close this case.

Paul V. Niemeyer
United States District Judge

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF THE STATE
OF
FLORIDA FOURTH DISTRICT
JANUARY TERM 1989

BLUE CROSS/BLUE SHIELD
OF FLORIDA, INC.,

Appellant,

v.

ROBERT WEINER, MARGARET
WEINER, MARK WEINER and
ROBERT WEINER, as Personal
Representative of the
Estate of STEVEN WEINER,
BLUE CROSS OF MARYLAND,
INC., BLUE SHIELD OF
MARYLAND, INC., BLUE CROSS
AND BLUE SHIELD OF
MARYLAND, INC.,

Appellees.

NOT FINAL UNTIL TIME
EXPIRES TO FILE
REHEARING MOTION
AND, IF FILED,
DISPOSED OF.

CASE NOS. 4-86-2899
4-86-2924
4-86-2925
4-86-2926
and 4-86-2927.

Opinion filed April 26, 1989

Consolidated appeals from the
Circuit Court for Broward County;
Robert L. Andrews, Judge.

Alan C. Sundburg and Sylvia Wabolt of Carlton, Fields, Ward, Emmanuel, Smith, Cutler & Kent, P.A., Tampa; Esler & Kirschbaum, P.A., Fort Lauderdale; Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, Miami; for appellant.

Joan Fowler and G. Bart Billbrough of Walton Lantaff Schroeder & Carson, West Palm Beach, for Blue Cross/Blue Shield of Maryland, Inc., Blue Cross of Maryland, Inc., and Blue Shield of Maryland, Inc.

Larry S. Stewart and James B. Tilghman, Jr., of Stewart Tilghman Fox & Bianchi, P.A., Miami, for Appellees-Weiner.

STONE, J.

This is a consolidated appeal for a final judgment in favor of the Weiners, the insureds, against Blue Cross and Blue Shield of Florida (Florida) and Blue Cross and Blue Shield of Maryland (Maryland). The jury returned a verdict against both companies on claims of fraud and intentional infliction of emotional distress, and against Maryland on negligence as well.

The claims arose out of a denial of coverage by Maryland. Maryland had issued a group health insurance plan which it sold to individual gasoline service station retailers through an independent marketing company, ASFI, supposedly in cooperation with the national and state service station dealers associations. Maryland retained Florida as its agent to service those accounts in this state. Maryland wrote the policies, and prepared a National Account Enrolled Group Summary (NAEGS), which set out guidelines to be followed by the servicing agents in each state in administering the group policy.

The plaintiff joined Service Station Dealers of America and purchased health insurance coverage for his family through ASFI, which became effective in March 1982. At that time the policy covered his sons, Mark, age 18, and Steven, age 20, who was enrolled as a full-time student. Tragically, on August 21, 1982, Mark, as a result of an accident, became a quadriplegic. During that same summer, Steven was diagnosed as having a fatal illness and did not return to school. Both required hospitalization and extensive nursing care. In August 1983, a decision was made by Maryland, and communicated to plaintiffs through Florida, that Mark was not covered since the accident occurred after his 19th birthday, and that Steven was not covered because he was no longer a full-time student.

In fact, the benefits book prepared by Maryland provided that children were covered until the end of the calendar year in which they turned 19 and that full-time students were covered until the end of the calendar year in which they turned 23. However, the NAEGS provided that, where a 19 year old, or older, child was incapable of self support due to physical incapacity, that child would remain covered, provided the incapacity occurred prior to the child's 19th birthday.

The Weiners' nursing service terminated home care as to both children when they learned that coverage was no longer available. The plaintiffs' attorney contacted Florida and was told that the question of coverage was Maryland's decision. The attorney was referred to a Maryland executive, who advised him that Maryland had terminated coverage. The result was loss and suffering by the family from the lack of nursing care. Florida did offer, and did furnish, a conversion policy as to Mark, which did not include major medical coverage. It did not advise plaintiffs of their right to a conversion policy for Steven.

In October 1983, the Weiners filed suit, alleging the following counts: I.) fraud as to Maryland; II.) fraud as to Flor-

ida for falsely representing to the plaintiffs that they needed to purchase a conversion policy for Mark after his 19th birthday; III.) intentional infliction of mental distress as to both companies; IV.) negligence as to Maryland; and V.) negligence as to Florida. In March 1984, Maryland agreed to reinstate the coverage. The jury found in favor of Florida on the negligence claim and in favor of plaintiffs on all other counts. The verdict against Maryland was for $500,000 compensatory damages and $5,000,000 punitive damages, and against Florida for $200,000 compensatory and $1,500,000 punitive damages.

With respect to the fraud claim, Florida contends that there was no evidence that the conduct of its employees was anything more than negligent. Florida argues that it was entitled to rely upon what it was told by its principal, Maryland, and by ASFI, as it did not have the contract, even if a copy of the booklet was in Florida's possession. We concur, and conclude that Florida was entitled to a directed verdict on the fraud claim. Recovery for fraud requires proof of intentional and knowing misrepresentation of material fact, designed to cause detrimental reliance. *See First Interstate Development Corp. v. Ablanedo*, 511 So.2d 536 (Fla. 1987); *A.S.J. Drugs, Inc. v. Berkowitz*, 459 So.2d 348 (Fla. 4th DCA 1984). As an agent, Florida relayed the decisions of its principal to plaintiffs and their attorney. There was no proof of any intentional misrepresentation or any actual knowledge by Florida that Mark and Steven remained covered by the Maryland policy.

While the failure of Florida to provide broader benefits in the conversion contract may have been negligent, or a breach of contract, there is no proof of fraud. The evidence reflects that even prior to the accident, ASFI, which had no connection to Florida, had advised plaintiffs of the impending expiration of coverage upon Mark's 19th birthday and directed the insured to contact Florida about conversion to a non-group plan for Mark, and that this advice was subse-

quently repeated to plaintiffs by ASFI. It is further apparent from the record that once Maryland decided to terminate coverage, Florida had a contractual duty to offer the alternative coverage. Thus, the plaintiffs failed to establish that Florida knew that any of its representations, either as to the need for a conversion policy or as to coverage under either policy, were false.

With respect to the intentional infliction of emotional distress claim against Florida, we also reverse. In *Metropolitan Life Insurance Co. v. McCarson*, 467 So.2d 277 (Fla. 1985), the supreme court applied these comments given in the *Restatement (Second) of Torts*, §46 (1965):

> d.Extreme and outrageous conduct
>
> . . . It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice", or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one on which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"
>
> . . . .
>
> g. The conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.

There, Metropolitan Life issued a group insurance policy to McCarson, which covered employees of his shop, including

his wife. Mrs. McCarson became incapacitated the next year with Alzheimer's disease, and the insurer stopped payment of her benefits, claiming her condition was preexisting. McCarson filed suit and Metropolitan Life was found in breach of contract and ordered to provide coverage. Mrs. McCarson later needed continual nursing care, for which Metropolitan was responsible until the policy lapsed or she became eligible for Medicare. The insurer requested proof of ineligibility for Medicare, and discontinued payment of benefits when it received no response. Looking at the facts in the light most favorable to the plaintiff, the supreme court ruled that they were not, as a matter of law, "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.'" *McCarson* at 279.

Here, there was no evidence that Florida has the authority to make independent coverage decisions with respect to Maryland's policy, and it initially double checked the coverage question with Maryland. In any event, it is undisputed that, when questioned about the coverage issue, Florida referred plaintiffs' counsel to Maryland, and that all further discussion were between them. The proof s.mply failed to reach the heavy burden required for recovery on this tort. *See Metropolitan Life Insurance Co. v. McCarson*; *Swinarski v. Keller*, 529 So.2d 1208 (Fla. 4th DCA 1988); *Davis v. Gulf Life Insurance Co.*, 502 So.2d 1012 (Fla. 3d DCA 1987). *See also Campbell v. Prudential Insurance Co.*, 480 So.2d 666 (Fla. 5th DCA 1985). *Cf. Dominguez v. Equitable Life Assurance Society of the United States*, 438 So.2d 58 (Fla. 3d DCA 1983).

Therefore as to Florida, we conclude that the trial court erred in denying Florida's motion for directed verdict as to the plaintiffs' claims for fraud and intentional infliction of emotional distress, and reverse.

With respect to Maryland, we first find no error in the instruction to the jury that ASFI was an agent of Maryland in connection with the group health plan. Ordinarily the existence of an agency relationship is a question of fact.

Orlando Executive Park, Inc. v. Robbins, 433 So.2d 491 (Fla. 1983); *Folwell v. Bernard*, 477 So.2d 1060 (Fla. 2d DCA 1985), *rev. denied*, 486 So.2d 595 (Fla. 1986). However, here the relationship between Maryland and ASFI, in the development of and the national marketing of the group plan, in distributing Maryland's benefit book, and in other acts pursuant to the agreement between them, is susceptible of only one interpretation. *See Jaar v. University of Miami*, 474 So.2d 239 (Fla.3d DCA 1985), *rev. denied*, 484 So.2d 10 (Fla. 1986). Therefore, the trial court did not err in concluding as a matter of law that ASFI was acting on Maryland's behalf.

As to Maryland, we are satisfied that there was sufficient evidence in the record, when considering inferences that may be drawn from the proofs, to submit the issue of fraud to the jury. *See U.S. Home Corporation, Rutenberg Homes Division v. Metropolitan Property and Liability Insurance Co.*, 516 So.2d 3 (Fla.2d DCA 1987); *Needle v. Lowenberg*, 421 So.2d 678 (Fla. 4th DCA 1982); *rev. denied*, 427 So.2d 737 (Fla. 1983); *Nantell v. Lim-Wick Construction Co.*, 228 So.2d 634 (Fla. 4th DCA 1969). *Cf. Sun Life Assurance Company of Canada v. Land Concepts, Inc.*, 435 So.2d 862 (Fla. 4th DCA 1983); *First National Bank of Stuart v. Jackson*, 267 So.2d 697 (Fla. 4th DCA 1972). We also find no error in submitting the issue of punitive damages to the jury. *First Interstate Development Corp. v. Ablenado*, 511 So.2d 536 (Fla. 1987); *Rappaport v. Jimmy Bryan Toyota of Fort Lauderdale, Inc.*, 522 So.2d 1005 (Fla. 4th DCA 1988); *Ruding v. Thompson*, 517 So.2d 706 (Fla. 4th DCA 1987)

The appellees argue that Maryland's motion for directed verdict on the punitive damage issue did not question the sufficiency of proof on the fraud and emotional distress claims. However, we need not examine this point, nor whether the evidence supports the jury's findings that Maryland's actions amounted to an intentional infliction of emotional distress. The verdict form used here does not contain separate findings for damages for each count pled. As the

verdict may be sustained on any one of the theories submitted to the jury, reversal is improper where no error is found as to one of those theories. *See Colonial Stores, Inc. v. Scarbrough*, 355 So.2d 1181 (Fla. 1978); *Florida Patient's Compensation Fund v. Sitomer*, 524 So.2d 671 (Fla. 4th DCA 1988); *Howell v. Woods*, 489 So.2d 154 (Fla. 4th DCA 1986); *Getelman v. Leve*, 481 So.2d 1236 (Fla.3d DCA 1985).

Maryland's principal assertion on appeal is that there is a lack of jurisdiction over the subject matter because the plaintiff's claim is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001-1461, ("ERISA"), and that state courts do not have concurrent jurisdiction. *See also Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987). However, we find that ERISA does not apply to this policy.

ERISA regulates employee benefit plans, including ones providing for medical and hospital care, if the plan is established or maintained by an employer or employee organization or both. ERISA §4(a), 29 U.S.C. §1003(a). Here, the record does not support a conclusion that there was an employee plan. The record does not reveal any agreement between the service station dealers associations and Maryland or ASFI. The evidence, although disputed, reflects that the plaintiff here was a sole proprietor who simply purchased a group policy for his family. *See Xaros v. U.S. Fidelity and Guaranty Co.*, 820 F.2d 1176 (11th Cir. 1987); *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982); *Taggart Corp. v. Life and Health Benefits Administration, Inc.*, 617 F.2d 1208 (5th Cir. 1980). Here there was no plan, or even an informal agreement, established or maintained by an employer or an employee organization. Nor were any fiduciary responsibilities created by this insurance marketing scheme, which simply made group insurance available to members of the organization.

Maryland contends that attorney's fees were improperly taxed under section 627.428, Florida Statutes. However, it

appears that this action involved additional issues other than those presented on appeal regarding the plaintiffs' tort claims. The trial court found that matters of coverage and interpretation of the policy were the "central core" of the trial. The trial court acknowledged that the sums sought and amount of hours appeared large, but were in part necessitated by obstructionist tactics. Generally claimants are not entitled to attorney's fees under section 627.428 in a tort action. *E.g., United General Life Insurance Co. v. Koske*, 519 So.2d 71 (Fla. 5th DCA 1988); *United Services Automobile Association v. Kiibler*, 364 So.2d 57 (Fla. 3d DCA 1978). However, the trial court determined that this award was founded on the hours utilized in resolving coverage. Nor has Maryland shown that the amount of the fee was clearly excessive. *See Good Samaritan Hospital Ass'n v. Saylor*, 495 So.2d 782 (Fla. 4th DCA 1986). *See also State Farm Fire & Casualty Co. v. Palma*, 524 So.2d 1035 (Fla. 4th DCA 1988).

As we are reversing the judgment against Florida, the award of attorney's fees in favor of the insured must be reversed as to Florida. We therefore reverse the judgment of attorney's fees and remand in order that they may be reapportioned as to Maryland alone.

We find the other issues raised by Maryland also to be without merit. Therefore, the final judgment is affirmed as to Maryland and reversed as to Florida. We remand so that an amended judgment against Maryland may be entered accordingly.

DOWNEY and LETTS, J.J., concur.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
March 1, 1991

No. 90-1008

ROBERT WEINER; MARGARET WEINER; MARK WEINER; ROBERT WEINER, as personal representative of the estate of Steven Weiner

Plaintiff—Appellees

v.

BLUE CROSS & BLUE SHIELD OF MARYLAND, INC.

Defendant—Appellant

and

BLUE CROSS OF MARYLAND, INC.; BLUE SHIELD OF MARYLAND, INC.; BLUE CROSS/BLUE SHIELD OF FLORIDA, INC.

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no mem-

ber of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Hall and Judge Cacheris, United States District Court Judge sitting by designation.

For the Court,

[JOHN M. GREACEN]

CLERK

APPENDIX E

Pursuant to Rule 29.1, following are the corporate affiliates of Blue Cross and Blue Shield of Maryland, Inc.:

Blue Cross and Blue Shield of Maryland
Finance Company, Inc.
Employers Compliance Services, Inc.
Sterling Health Services, Inc.
Maryland Medical Services, Inc.
DBG Holdings, Inc.
Community Health Services, Inc.
Free State Health Plan, Inc.
Healthline, Inc.
PerTek, Inc.
Benefit Services International, Inc.
Free State Management, Inc.
LifeCard, Inc.
Columbia Medical Plan, Inc.
Health Management Corporation, Inc.
Willse and Associates, Inc.
Columbia Free State Management, Inc.
Twin Knolls Pharmacy, Inc.
Patuxent Medical Group, Inc.
Columbia Dental Plan, Inc.
Patuxent Surgicare, Inc.
Greenspring Mental Health Services, Inc.
Judgment Process Company, Inc.
Columbia Optical Management, Inc.